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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. ~~754~~ 72

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*

v.

FEDERAL POWER COMMISSION AND PHILLIPS PETROLEUM COMPANY, *Respondents*.

No. ~~755~~ 73

PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners*

v.

FEDERAL POWER COMMISSION AND PHILLIPS PETROLEUM COMPANY, *Respondents*.

No. ~~756~~ 74

LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY AND THE UNITED GAS IMPROVEMENT COMPANY, *Petitioners*

v.

FEDERAL POWER COMMISSION AND PHILLIPS PETROLEUM COMPANY, *Respondents*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF PHILLIPS PETROLEUM COMPANY TO CORRECT AND AMEND TITLE AND CAPTION AND BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 754

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*.

No. 755

PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*.

No. 756

LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY, AND THE UNITED GAS IMPROVEMENT COMPANY, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF PHILLIPS PETROLEUM COMPANY TO CORRECT AND AMEND TITLE AND CAPTION

Phillips Petroleum Company, a corporation (hereinafter called Phillips), hereby respectfully moves this Honorable Court for a rule or order to correct and

amend the title and caption of this proceeding to show "Phillips Petroleum Company" as a party respondent, and to permit Phillips to file briefs in this proceeding as a respondent, upon the following grounds and for these reasons:

I.

In the Court of Appeals for the District of Columbia Circuit from whose decision writs of certiorari are sought, the parties were aligned with Petitioners herein, and the Public Service Commission of the State of New York, Intervenor, on one side, and the Federal Power Commission as Respondent, and Phillips as Intervenor-Respondent, on the other side. As an Intervenor-Respondent in the proceedings, Phillips filed a brief in support of the order of the Federal Power Commission and participated in the oral argument to the Court of Appeals for the District of Columbia Circuit.

II.

Phillips is the real party in interest in these proceedings. Petitioners seek writs of certiorari to the Court of Appeals for the District of Columbia Circuit for the review by this Court of the decision of the Court of Appeals affirming the order of the Federal Power Commission dismissing proceedings, under Sections 4(e) and 5(a) of the Natural Gas Act, involving the rates of Phillips for sales of natural gas in interstate commerce for resale. In their petitions, the Petitioners request this Court to order the Federal Power Commission to reopen the proceedings and to continue its investigation of the rates of Phillips.

III.

Each of the Petitioners, at the time of filing its petition for writ of certiorari in this Court, promptly served a copy of its petition on Phillips. In addition, each Petitioner, pursuant to Rule 21(1), has formally notified Phillips of the filing of its petition and of the contents of the record filed, all upon the printed forms supplied for use in this Court. In No. 754 and No. 755, such notices were directed to counsel for Phillips as "Counsel for Respondent". In No. 756, such notice consisted of a copy of the notice to the Hon. Archibald Cox, Solicitor General of the United States.

IV.

In addition to the foregoing, Phillips respectfully asserts:

(a) That it is a full party, and a real party in interest, in the proceedings here as it was in the court below;

(b) The denial of such party status to Phillips would deny to Phillips its day in this Honorable Court to defend its substantial rights;

(c) Any judgment altering these rights in any proproceeding in which Phillips is not a party would injuriously affect its interest and would constitute a denial to Phillips of due process of law under the Fifth Amendment to the Constitution of the United States.

WHEREFORE, Phillips respectfully prays that this Court issue its rule or order correcting and amending the title and caption of this proceeding by showing Phillips Petroleum Company as one of the respondents

and permitting Phillips to participate in this proceeding as a respondent.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 754

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*

v.

FEDERAL POWER COMMISSION AND PHILLIPS PETROLEUM COMPANY, *Respondents.*

No. 755

PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners*

v.

FEDERAL POWER COMMISSION AND PHILLIPS PETROLEUM COMPANY, *Respondents.*

No. 756

LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY AND THE UNITED GAS IMPROVEMENT COMPANY, *Petitioners*

v.

FEDERAL POWER COMMISSION AND PHILLIPS PETROLEUM COMPANY, *Respondents.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT PHILLIPS PETROLEUM COMPANY IN OPPOSITION

OPINIONS BELOW

The Opinion and order of the Federal Power Commission (R. 251-342) is reported at 24 FPC 537, and the Commission's Order Denying Rehearing (R. 395-

404) is reported at 24 FPC 1008. The decision of the Presiding Examiner (R. 35-217) is reported at 24 FPC 590. The opinion of the Court of Appeals is not yet reported (Appendix A to the Petitions).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

QUESTIONS PRESENTED

The principal question presented is:

1. May the Federal Power Commission terminate its investigation of the rates of an independent producer under Sections 4(e) and 5(a) of the Natural Gas Act after reviewing the record and making unchallenged findings that (1) test year cost of service substantially exceeded test year revenues (after allowing for Section 4(e) increases), (2) there is nothing to show that existing rates are unduly discriminatory or preferential, and (3) at the time of decision in 1960, the 1954 test year is not suitable for fixing future rates?

An additional question which is presented only in No. 755 is:

2. May the Federal Power Commission refuse to reject a rate increase based on contractual provisions which (after a specified increase in the wholesale commodity index) permit a producer to increase its price in proportion to an increase in the resale rate of the pipeline company purchaser, where the Commission considered such provisions as constituting nothing more than contractual consent to a rate increase which must be otherwise justified?

STATUTE INVOLVED

The statute involved is the Natural Gas Act (52 Stat. 821-833, as amended; Title 15 USC, Secs. 717-717w). The pertinent provisions are printed in Appendix E to the Petition in No. 754; Appendix B to the Petition in No. 755, and Appendix C to the Petition in No. 756.

STATEMENT

I. The Proceedings Before the Commission

Following the decision of this Court in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954), the Federal Power Commission (Commission) reinstituted its investigation into the rates of Phillips Petroleum Company (Phillips). In addition to its general investigation under Section 5(a) of the Natural Gas Act (Act), the Commission by orders issued May 8, 1956 and April 26, 1957 (R. 21, 27) consolidated twelve separate proceedings involving rate increases of Phillips which were suspended pursuant to Section 4(e) of the Act. Except in one minor case (Docket No. G-8623 involving an annual increase of $21,234, R. 325) all of these Section 4(e) docket proceedings have been superseded by other rate increase filings which have been suspended and are still pending before the Commission in other dockets.

Hearings began in June 1956 and extended to December 1957. Voluminous evidence was received. Phillips, the Commission Staff, and thirty-one Intervenors actively participated in the hearings (R. 252).

Following the close of hearings, the Examiner presiding at the hearings issued a lengthy decision (R. 35-217). Numerous exceptions to his decision were then filed with the Commission. On September 28,

1960, the Commission issued a comprehensive opinion reviewing and passing upon the issues presented and allowing and disallowing exceptions to the Examiner's decision (R. 251-342). On November 25, 1960, the Commission issued its order passing upon applications for rehearing filed by various intervenors, amending in part its previous opinion and order and otherwise denying the applications for rehearing (R. 395-402).

II. The Opinion of the Commission

The Opinion of the Commission fulfilled two separate functions. In major part it was a determination by the Commission, based upon the evidence of record in this proceeding, of the cost of service of Phillips' natural gas operations for a test year (1954) and a comparison of that cost of service with the revenues provided by Phillips' contract rates (R. 269-342). This portion of the Commission's opinion dealt solely with Phillips, was based on evidence which applied equally and without distinction to both the Sections 4(e) and 5(a) proceedings, and in substance constituted an application by the Commission to Phillips' rates of cost principles of the kind referred to in *City of Detroit* v. *Federal Power Commission*, 230 F. 2d 810 (CADC, 1956, cert. den. 352 U.S. 829).

In addition, the Commission used its decision as a vehicle in which to discuss, based upon its experience in this and other cases involving independent producers, the impracticality and unworkability of individual company cost of service as the basic tool by which to regulate all independent producers (R. 256-269). As a part of that discussion (R. 266), the Commission announced that by separate document (Statement of General Policy No. 61-1, not docketed as a part of this

proceeding) it was describing and inaugurating a different method of regulating producers to be adopted in future proceedings (R. 343-348). It is this separate document which draws much of the attention of Petitioners.

With regard to the Phillips contract rates which were before it in this proceeding, the Commission stated:

> "While we have found that the rate base method is not an effective means of regulating the producers' prices, evidence in this proceeding was presented almost entirely upon the cost basis and, of course, there were no ceiling prices issued by us at the time of the hearing. There was some field price evidence introduced, but if field prices could be employed in arriving at rates for Phillips, the evidence was incomplete and unrepresentative of Phillips' diverse sales. Therefore we shall proceed on the basis of the evidence adduced in this case to reach conclusions, as reasonable, intelligent and logical as possible even though we know and have herein stated the difficulties inherent in determining a cost of service for Phillips using the rate base method. This is clearly a lawful way to determine rates for Phillips as illustrated by the *City of Detroit* case, and under the present record is the only possible method, and therefore we shall make every effort to reach a result by this means." (R. 269)

The Commission then proceeded to make specific findings. It determined the cost of service for Phillips for the test year (R. 322). It found that the cost of service exceeded the revenues provided by the contract rates (R. 326) by more than nine million dollars per year (based upon the modified cost of service set forth in the order on rehearing, R. 401). It found that Phillips' existing contract rates were not unduly dis-

criminatory or preferential (R. 325). It found that the Section 4(e) increases consolidated with this proceeding had been superseded by further increases, that these superseded rate increases had produced revenues less than cost while they were in effect, and that none of these increases was unduly discriminatory or preferential (R. 325-326).

Based upon its findings that cost of service exceeded revenues, the Commission terminated both the Section 3(a) and Section 4(e) proceedings. It reviewed the greatly varying contentions of the parties regarding methods of fixing rates for the future (R. 323), which included (before the Examiner) the highly contested issue of whether the Commission was entitled to permit Phillips to increase its rates above contract levels (R. 75-86). It concluded that the record before it was not suitable for fixing rates for the future (R. 324-325). It likewise concluded there was little point in determining precise rates for the Section 4(e) increases, since these rates applied only to past periods and the Commission was holding that no refunds were required (R. 325-326).

Petitioners did not challenge the Commission's finding that this record was not suitable for fixing rates for the future. Instead, some of them requested that the Commission reopen the record and start what in effect would constitute an entirely new proceeding. The Commission considered this request to reopen and denied it (R. 396-397).

III. The Decision of the Court of Appeals

The Court of Appeals considered the Commission's decision separately from the standpoint of the Section 4(e) increases and the determination of future rates in

Section 5(a) proceedings. It reviewed, first, the termination by the Commission of the Section 4(e) cases. The Court held that the Commission's findings that costs exceeded the revenues provided by these increases, and that the rates were not unduly discriminatory or preferential, justified the termination of those proceedings. The Court specifically held that under the circumstances the Commission was not required to make intermediate (and in effect pointless) findings as to whether the individual rates were just and reasonable during the periods they were in effect. Secondly, the Court held that it was proper for the Commission to announce area rates as a proper method of fixing future rates for independent producers. The Court specifically denied Petitioners' contention that the Commission was abandoning or deferring regulation of producers.

With one Judge dissenting, the Court affirmed the Commission.

ARGUMENT

Petitioners would have the Court believe this case involves broad questions of administrative policy in the enforcement of the Natural Gas Act. Such questions are not presented on this record. This appeal is not from any order issued in an area rate proceeding but rather is confined to a rate order related to Phillips' operations. The action which the Commission took on the basis of the record before it was truly narrow in scope.

The record in this proceeding demonstrates that there are no grounds for granting a writ of certiorari. The petitions filed herein are bottomed on the supposition that this Court has the power and authority to tell

the Commission when it shall terminate a proceeding; when that proceeding must be expanded by reopening the record; and, on the basis of a new record, instruct the Commission as to the rate making formula it should adopt, all contrary to established holdings of this Court. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-515 (1944); *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535 (1946); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138, 142, 143 (1940).

The substance of the Commission's decision was that, measured by a test year, Phillips' contract rates produced revenues less than its cost of service. In the course of its progress toward that ultimate finding, the Commission did decide many broad rate regulatory questions relating to allocation methods and principles of cost determination—but those broad questions which do exist in this record are not raised here. Other issues decided related solely to the particular situation of Phillips. As we will show (*infra*, p. 21), one of those—the issue raised by California relating to the so-called "spiral escalation clauses"—has lost much of its significance even as to Phillips.

The issues which Petitioners seek to inject into this proceeding are in reality issues relating to possible *future* action by the Commission in *other* proceedings. The Commission used its opinion in this proceeding as a vehicle to announce and describe a method of regulation which it intends to follow in future proceedings. It did not employ that new method in this case. On the contrary, it employed here the identical cost of service

principles which Petitioners now urge this Court to direct the Commission to follow in regard to the fixing of future rates for Phillips. Applying such cost of service principles, it made findings which Petitioners do not challenge.

Petitioners do not seek relief on the basis of this record. They do not want the Commission's action to be limited to the rate schedules which were before the Commission on this record. Petitioners are adamant that the record must be reopened and supplemented (in substance a new record in a new proceeding). In fact, it would appear that Petitioners' primary concern is not even with rates for Phillips. Petitioners seem far more concerned with obtaining a directive to the Commission to act in a particular fashion with respect to other producers in other proceedings.

If and when properly presented in proceedings in which the facts are appropriate, questions as to the validity or application of the proposed area rates may indeed be worthy of this Court's consideration. So far as this proceeding is concerned, such questions are presented in a vacuum. In the posture of the record in this proceeding, Petitioners' request to this Court constitutes nothing more than a request for the same type of advisory opinion which was sought from and refused by this Court in *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89 (1946).

I. The Commission Has Done All That the Natural Gas Act Permitted It to Do on the Basis of This Record

Petitioners do not contend that, on the basis of the record before it, the Commission could or should have reduced Phillips' rates. The Commission found that

Phillips' costs exceeded the revenues provided by its contract rates (R. 326). Petitioners do not challenge that finding. The Commission did not find Phillips' contract rates to be either unjust and unreasonable or unduly discriminatory and preferential. No one now contends that it should have done so.

Absent findings that Phillips' rates were unjust and unreasonable, or unduly discriminatory and preferential, the Commission was powerless to prescribe rates for the future. Section 5(a) of the Act provides that:

> "Whenever the Commission . . . shall find that any rate . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate . . . to be thereafter observed and enforced, and shall fix the same by order . . ."

This Court has said that such a finding is a "condition precedent" to the exercise of the Commission's rate fixing powers. *Federal Power Commission* v. *Sierra Pacific Power Company*, 350 U.S. 348, 353 (1956).

It is not a condition precedent to allowing existing rates to remain in force that the Commission hold existing rates to be just and reasonable. Quite to the contrary, this Court held in *Sierra, supra* (350 U.S. 354, 355) that, even though costs exceed contract rates, the Commission may not fix different rates unless it can hold the existing rates unjust and unreasonable as contrary to the public interest (as distinguished from the private interest of the company). Thus, the Commission may be obligated to permit a rate to remain in effect even though it could not hold such a rate to be just and reasonable and could not impose such a rate upon the affected natural gas company.

The assertion by Petitioners that the Commission has permitted Phillips' rates to remain in effect without finding that such rates are just and reasonable thus presents no question for review. The Commission did make the unchallenged finding that, on the basis of the record before it, such rates produced less than a fair return. The Commission did not find such contract rates to be so low as to be contrary to the public interest. Consequently, the Commission could not, within the limitations of *Sierra*, hold Phillips' existing rates to be unjust and unreasonable, set aside Phillips' contracts and permit Phillips to file increased rates. No one now contends that it should have done so.

On the basis of these unchallenged findings, termination of the proceedings was the only alternative left open to the Commission.

Petitioners' contentions stem from a misunderstanding of the purpose and intent of the Natural Gas Act. Petitioners seem to assume that contract rates are unlawful *per se* and that the Act contemplates only rates "fixed" by the Commission. They imply that the Commission has shirked its duty if it merely reviews contract rates and refuses, on the basis of the record before it, to "fix" a different set of rates. The theory of the Act is exactly opposite. In *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, this Court stated that the Act ". . . evinces no purpose to abrogate private rate contracts as such" (350 U.S. at 338) and that the ". . . basic power of the Commission . . . is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them" (350 U.S. at 341).

In substance, the contention that the Commission has failed to "fix" the rates of Phillips is nothing more than a lament that, on the this record, the Act did not authorize such action. Because the Commission made unchallenged findings which did not authorize the alteration of the contract rates before it, Petitioners assert that the Commission has "abandoned" regulation. Such assertion cannot hide from this Court the fact that the alleged questions "of major and general importance" constitute nothing more than a plea that this Court direct the Commission to see whether it can do otherwise on the basis of a different record.

Petitioners did not challenge the Commission's finding that this record is unsuitable for the purpose of fixing rates for the future. Petitioners adopted the alternative course of asking the Commission to reopen the proceedings (R. 381-382). In the court below Petitioners sought to have the record reopened for incorporation of more recent data. The Commission specifically denied the motion to reopen (R. 396-397). Such action is clearly within the sole discretion of the Commission. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-515 (1944); *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535 (1946); *City of Detroit* v. *Federal Power Commission*, 230 F. 2d 810, 822 (CADC, 1956, cert. den. 352 U.S. 829).

Petitioners' request that this Court direct the Commission to fix rates for the future is in substance a request for a direction to the Commission to institute a completely new proceeding. In fact, as the Commission found the 1954 test year to be no longer usable, it recognized in its order denying rehearing (R. 397) that a new full blown rate proceeding would be required.

Whether this proceeding should be reopened or whether Phillips' rates should be considered in a new proceeding is a matter for Commission decision and not the Courts. *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134 (1940).

II. The Court Below Properly Held That the Choice of Methods of Regulation in Future Proceedings is the Sole Province of the Commission

The Commission decided this case on the basis of the cost of service as determined for Phillips (R. 269-272). It announced that in future proceedings it would employ a different method (R. 265-266). Contrary to the assertions of Petitioners, the Commission has neither abandoned nor deferred regulation of producers. It is proceeding along the course it has outlined for itself. In the words of the Court below, "... instead of abandoning regulation it is making regulation effective" (No. 756, Appendix A, page 18a).

The method which the Commission used to reach its conclusions with respect to Phillips' rates in this proceeding appears wholly acceptable to Petitioners. With regard to future proceedings, Petitioners feel their choice of method is superior to that of the Commission. Their assertions that the Commission has abdicated its jurisdiction and that it has indefinitely deferred regulation of producers is but a different way of saying that Petitioners desire the Court to force Petitioners' choice upon the Commission.

Petitioners envision great delay in further proceedings affecting Phillips and other producers. But there is, and could be, no showing here that a new proceeding

under procedures dictated by the Court would reach a conclusion faster than hearings under methods selected by the Commission. A new test year would have to be selected—a matter of possible dispute in itself—and new test year data would have to be prepared, always a lengthy process. New issues would likely arise from such new data. As we have indicated, Petitioners express far more concern with the rates of others than with the rates of Phillips. It is but idle speculation to assert that review of all producers' rates will be accomplished faster on a one-by-one basis than in proceedings involving all producers simultaneously.

The asserted injury to the consuming public pending completion of future proceedings is wholly without support in this record. On the basis of this record, the Commission found that consumers have a price advantage. We think they have other advantages. Petitioners cannot show that they will be entitled to results more favorable to them under the method which they propound than under the method now being pursued by the Commission.

The suggested deferral of regulation by the Commission presents a question which has long been settled by this Court. As we have shown, it is nothing more than a request that the Court dictate the methods which the Commission should use and the order in which it should conduct its business. This Court long ago held that the Commission is ". . . not bound to the use of any single formula or combination of formulae in determining rates". *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). The Court below properly

held that the selection of methods, procedures and order of business before the Commission is solely a matter for the Commission.

Clearly there is no occasion for this Court to consider that question again. Petitioners do not present reason for review merely by describing an old question in new words.

III. California's Contentions With Respect to the Section 4(e) Refund Cases Relate to Matters Having No Future Significance and Which Are Wholly Confined to Matters Peculiar to Phillips

Even more narrow in scope is that portion of the Commission's decision passing upon the suspended Section 4(e) increases. Here the Commission had before it rates which had been superseded by further increases. On the basis of its findings that the superseded rates had produced revenues less than the cost of service while they were in effect and that they were not unduly discriminatory or preferential, the Commission dismissed the Section 4(e) proceedings and relieved Phillips of all obligation to refund. The Court of Appeals reviewed this action in detail and concluded that this action fell well within the bounds of Commission discretion (Appendix A, No. 756, pages 10a-13a). Only California raises any question with regard to this portion of the Commission's decision (No. 755, pages 15-20).

The action which California desires this Court to take with respect to this portion of the Commission's decision is best described as obscure. California does not contend that the Commission could have ordered refunds on the basis of the record before it. It does not suggest that the Commission could or should order

refunds if the proceedings were remanded to the Commission. California's sole complaint appears to be that the Commission did not use the words "just and reasonable" with respect to these rates. Nothing in the language of the Act requires an express finding that rates are just and reasonable. In any event, it does not appear that the results would have been different if the Commission had taken the action demanded by California.

These rate increases are peculiar to Phillips. No precedents have been established which will affect or even become involved in future proceedings. Whatever the significance of the questions which Petitioners seek to raise concerning the Section 5(a) proceedings, it is apparent that the Commission's decision with respect to these Section 4(e) increases does not justify the grant of certiorari.

IV. The So-Called Spiral Escalation Clause Increases Are Limited in Scope and Have Little Future Effect

As a part of its decision with respect to the Section 4(e) increases, the Commission held that Phillips was entitled to file rate increases permitted by certain contractual provisions which California calls "spiral escalation clauses". These contract provisions permit Phillips (but only after a specified increase in a designated commodity index) to increase its rates in proportion to an increase by the purchaser from Phillips. The application of one of these provisions was upheld and enforced in *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F. 2d 470 (10th Cir., 1955, cert. den. *sub nom. Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Company*, 350 U.S. 1005).

The various contentions as to these clauses were carefully reviewed by both the Presiding Examiner and the Commission. Both the Examiner (R. 196-208) and the Commission (R. 326-328) emphasized that they treated these clauses as doing no more than providing the contractual consent which is required by this Court's decision in *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The increase in Docket No. G-10793 was allowed because the revenues resulting from these contract provisions were less than the cost of service; the increases in Docket Nos. G-10883 and G-11217 were given tentative approval on the same basis, subject to the amount of increase finally allowed to the affected pipeline company purchaser. Phillips was required to justify the increases under these clauses in the same manner as increases permitted by any other contract provisions.

These particular contract provisions are far more limited in application and much more restrictive upon the producer than the unrestricted increase provisions approved by this Court in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958). California does not contend that the level of rates permitted by these contract provisions is excessive. Two of the three contracts containing these provisions have been amended to delete this type of provision (including the one affecting California). So far as is known, this type of contract provision is peculiar to Phillips and is not in general use by other producers.

There is nothing in these clauses or in the Commission's treatment of them which can be said to be of general interest. It is apparent that they have restricted future application even as to Phillips.

CONCLUSION

For the foregoing reasons it is respectfully submitted that these petitions for writs of certiorari should be denied.

Respectfully submitted,

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